

ADDENDUM

to the

**FINAL NEGATIVE DECLARATION ADOPTED BY THE LEAD
AGENCY
DEPARTMENT OF WATER RESOURCES
FOR THE ONGOING OPERATIONS OF THE CALIFORNIA STATE
WATER PROJECT IN THE SACRAMENTO-SAN JOAQUIN DELTA
FOR THE PROTECTION OF LONGFIN SMELT**

as prepared by the

CALIFORNIA DEPARTMENT OF FISH AND GAME

as a

**RESPONSIBLE AGENCY UNDER THE
CALIFORNIA ENVIRONMENTAL QUALITY ACT**

for the

**STATE WATER PROJECT ONGOING OPERATIONS IN THE
SACRAMENTO/SAN JOAQUIN DELTA
INCIDENTAL TAKE PERMIT
UNDER SECTION 2081(b)
OF THE CALIFORNIA FISH AND GAME CODE**

FEBRUARY 23, 2009

I.

INTRODUCTION

The California Department of Fish and Game ("Department") has prepared this Addendum to comply with the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.). The Department is a "responsible agency" under CEQA with respect to the Department of Water Resources' (DWR) ongoing operations of the California State Water Project ("SWP") in the Sacramento-San Joaquin Delta for protection of longfin smelt ("Project"). The Department is a responsible agency because of its permitting authority under the California Endangered Species Act ("CESA") (Fish & G. Code, § 2050 et seq.). (See generally Pub. Resources Code, §§ 21104 subd. (c), 21069; CEQA Guidelines, § 15381; see also Cal. Code Regs., tit. 14, § 783.3, subd. (a).)¹ The Department prepared this Addendum, as a result of DWR's application for an incidental take permit ("ITP") for the Project under CESA. The Addendum, as a result, memorializes the Department's consideration of various issues under CEQA that pertain to the incidental take of longfin smelt protected by CESA that could result during the implementation of the Project. (See Fish & G. Code, § 2081, subd. (b); Cal. Code Regs., tit. 14, § 783.4.)

The Department is a responsible agency under CEQA with respect to the Project because of the prior environmental review and approval of the Project by DWR in its role as "lead agency." (See generally Pub. Resources Code, § 21067; CEQA Guidelines, § 15367.) As approved by DWR, the Project generally involves the operation of existing SWP facilities including: Clifton Court Forebay, Skinner Fish Facility, Harvey O. Banks Pumping Plant and the North Bay Aqueduct at Barker Slough. The Project also includes the operation of existing facilities in coordination with the Central Valley Project ("CVP") including: the Suisun Marsh Salinity Control Gates, Roaring River Distribution System, Morrow Island Distribution System, Goodyear Slough Outfall and the South Delta Temporary Barriers Project. In addition, the Project describes the process for decision-making and some of the specific actions found in the U.S. Fish and Wildlife Service's December 2008 Biological Opinion for delta smelt issued to the Bureau of Reclamation and DWR for the coordinated operations of the CVP and SWP as protective measures that DWR will implement to address SWP impacts to longfin smelt. The location of the various facilities of the Project fall within the range of longfin smelt (*Spirinchus thaleichthys*).

DWR, as the lead agency under CEQA, analyzed the environmental effects associated with the Project in a Negative Declaration ("ND") and approved the Project on February 18, 2009. The lead agency concluded that operation of the Project would not result in significant impacts to biological resources. The ITP pending before the Department is

¹The "CEQA Guidelines" are found in Title 14 of the California Code of Regulations, commencing with section 15000.

intended to minimize and fully mitigate the temporary and permanent impacts to longfin smelt caused by operation and implementation of the Project. In anticipation of approving the ITP under CESA, this document addresses the Department's specific obligations as a responsible agency under CEQA pursuant to CEQA Guidelines sections 15096 and 15164.

II.

OBLIGATIONS OF THE DEPARTMENT AS A RESPONSIBLE AGENCY

In general, a "responsible agency complies with CEQA by *considering* the EIR or Negative Declaration prepared by the lead agency and by reaching its own conclusions on whether and how to approve the project involved." (CEQA Guidelines, § 15096, subd. (a) (emphasis added).) By statute, a responsible agency is required to consider "only the effects of those activities involved in a project which it is required by law to carry out or approve." (Pub. Resources Code, § 21002.1, subd. (d).) Thus, while the Department must "consider the environmental effects" of the Project as disclosed in DWR's ND, the Department "has responsibility for mitigating or avoiding only the direct or indirect environmental effects of those parts of the project which it decides to carry out, finance, or approve." (CEQA Guidelines, § 15096(g)(1).) In the present case, as noted above, because the Department's exercise of discretion is limited to issuance of an ITP, the Department is responsible for considering only the environmental effects that fall within its permitting authority under CESA.

While the lead agency is preparing the ND, a responsible agency "shall respond to consultation by the lead agency in order to assist the lead agency in preparing adequate environmental documents for the project." (*Id.*, § 15096, subd. (b).) In addition, the responsible agency "should review and comment on draft EIRs and Negative Declarations for projects which the responsible agency would later be asked to approve." (*Id.*, § 15096, subd. (d).) In the present case, the Department has participated in the preparation of the lead agency's ND by sending a comment letter dated February 2, 2009. Attached is a copy of that letter.

At this point in the process, the Department may appropriately proceed as a responsible agency, and not as a lead agency, as a matter of law. The CEQA Guidelines provide that a "responsible agency shall assume the role of the lead agency" when any one of three conditions occur. (*Id.*, § 15052, subd. (a); see also *id.*, § 15096, subd. (e)(3)-(4).) First, the Department must assume the role of lead agency if the lead agency itself did not prepare any environmental document for the project under CEQA, and the statute of limitations to challenge to the lead agency's action has expired. (*Id.*, § 15052, subd. (a)(1).) DWR adopted the ND on February 18, 2009, and the statute of limitations on any CEQA challenges to the lead agency's actions will expire 30 days thereafter. The statute of limitations to challenge the ND has not expired and this condition does not apply.

Second, a responsible agency must assume the role of lead agency if (1) a subsequent EIR is required under CEQA Guidelines section 15162; (2) the lead agency has granted its final approval for the project; and (3) the statute of limitations for challenging the lead agency's actions under CEQA has expired. (*Id.*, § 15052, subd. (a)(2).) As discussed above, the statute of limitations on any CEQA challenges to the lead agency's action has not expired and therefore this condition does not apply. (See generally, Pub. Resources Code, § 21167; CEQA Guidelines, § 15112.)

Lastly, a responsible agency must assume the role of lead agency if the lead agency failed to consult with the responsible agency as it was required to do by CEQA and the statute of limitations for a challenge to the lead agency's action has expired. (*Id.*, § 15052, subd. (a)(3); CEQA Guidelines §§ 15072, 15082.) As noted above, the Department participated in the lead agency's environmental review of the Project to the extent required by CEQA. (See, e.g., *Id.*, §§ 15082, 15096, subds. (b), (c), (d).) Further, the statute of limitations has not expired. As a result, this condition does not apply. The Department, accordingly, is not required to assume the role of lead agency under CEQA Guidelines section 15052, and may proceed as a responsible agency within the meaning of CEQA for purposes of DWR's ITP.

As the Department anticipates making decisions as a responsible agency with respect to the Project, it has two further obligations under CEQA. First, as noted above, the Department "must consider the environmental effects of the project as shown" in DWR's ND. (*Id.*, § 15096, subd. (f).) At the same time, however, CEQA Guidelines section 15164, subdivision (b), provides that a "responsible agency *may* prepare an addendum to a previously certified EIR if only minor technical changes or additions are necessary but none of the conditions described in section 15162 calling for preparation of a subsequent EIR or negative declaration have occurred." (Emphasis added.) The Department's specific obligation in considering the environmental effects associated with issuance of the ITP necessarily includes an assessment of whether Project changes, changed circumstances, or "significant new information" require preparation of an subsequent EIR or ND or a supplement to the ND. (CEQA Guidelines, § 15096, subds. (e)(3), (f); see also *id.*, §§ 15162, 15163.) As discussed in more detail below, however, because any such changes do not rise to the level of change requiring preparation of an EIR the Department may properly prepare an addendum to the ND pursuant to CEQA Guidelines section 15164. (See also *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538, 1552; *River Valley Preservation Project v. Metropolitan Transit Development Board* (1995) 37 Cal.App.4th 154, 177.)

The Department's second major obligation under CEQA as a responsible agency concerns the required preparation of written findings for each significant environmental effect associated with issuance of the ITP under CESA. (CEQA Guidelines, § 15096, subd. (h); see also Pub. Resources Code, § 21081; CEQA Guidelines, §§ 15091, 15093.) Specifically, the Department must decide for itself how to respond to the significant environmental impacts that could result from authorization of incidental take

under CESA for the Project. (*Id.*, § 15096, subd. (g)(1).) To fulfill this obligation, the CEQA Guidelines provide that a responsible agency "shall not approve the Project as proposed if the agency finds any feasible alternative or feasible mitigation measures within its powers that would substantially lessen or avoid any significant effect the Project would have on the environment." (*Id.*, § 15096, subd. (g)(2); see also Pub. Resources Code, § 21002.1, subd. (d).) In so doing, CEQA imposes an obligation on the Department independent of the lead agency to assess whether there are feasible mitigation measures or alternatives within the Department's powers that would substantially reduce or avoid significant environmental impacts that may result because of issuance of the ITP. The Department's findings pursuant to CEQA Guidelines section 15096, subdivision (h), will be attached to the ITP issued for the Project.

III.

CONSIDERATION OF PROJECT CHANGES, CHANGED CIRCUMSTANCES AND POTENTIALLY SIGNIFICANT NEW INFORMATION

Pursuant to section 15096 of the CEQA Guidelines, the Department has considered the environmental effects of the discretionary decisions addressed by the ND. In carrying out its obligation to make independent findings under CEQA, the Department has considered issues related to the Project that may reflect changes to the Project, changed circumstances, or potentially significant new information. In considering the above-mentioned issues, the Department need not prepare a subsequent environmental document unless it concludes, based on substantial evidence in light of the whole record, that any of the following three conditions in CEQA Guidelines section 15162, subdivision (a), are present:

- Substantial changes are proposed in the project which will require major revisions to the previous EIR or environmental document due to the involvement of significant environmental effects or a substantial increase in the severity of previously identified significant effects.
- Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions to the previous EIR or environmental document.
- New information, which was not known and could not have been known at the time the previous EIR or environmental document was certified as complete, becomes available.

(Pub. Resources Code, § 21166; Cal. Code Regs., tit. 14, § 15162, subd. (a).)

A subsequent environmental document or a supplement to such prior analysis is not required under CEQA where substantial evidence in light of the whole record supports a determination that none of the conditions highlighted above are present. The Department, as explained below, determines that changes may have occurred by the addition of avoidance and mitigation measures, but that the changes do not result in potentially significant environmental impacts or a substantial increase in the severity of a previously identified potentially significant impact. The Department, as a result, may properly prepare and rely on this Addendum to fulfill its obligations under CEQA with respect to the proposed Project. (*Id.*, § 15164.)

A. Changes to the Project

As responsible agency, the Department is faced with a discretionary decision regarding issuance of an ITP under CESA. The Department is unable to issue an ITP pursuant to CESA if the issuance criteria enumerated in Fish and Game Code section 2081(b) are not met. The Project Description in DWR's ND includes a description of some, but not all, of the elements of the U.S. Fish and Wildlife Service's Biological Opinion ("BO") for delta smelt issued to the Bureau of Reclamation and DWR for the coordinated operations of the CVP and SWP as protective measures for SWP impacts to longfin smelt. To the extent that DFG is adding a description of other elements of that BO or other mitigation measures not specified in DWR's Project Description, such as measures related to the North Bay Aqueduct, Suisun Marsh, Morrow Island Distribution System, fish screens, and habitat restoration, it may be asserted that these additional measures constitute "changes" to the project, triggering section CEQA Guidelines section 15162.

However, the Department does not believe that the changes reveal previously undisclosed significant environmental impacts or a substantial increase in the severity of previously disclosed impacts. Substantial evidence in the record indicates that, to the limited extent such impacts of the Project might result, they will be avoided or mitigated to below a level of significance under CEQA through implementation of and adherence to the protective conditions of the ITP (*See generally*, Department's Effects Analysis for SWP Effects on Longfin Smelt, which analyzes what additional protective measures, beyond those required by the BO, would benefit adult, juvenile and larval longfin smelt.)¹. Accordingly, the Department does not believe additional environmental review is warranted.

However, additional CEQA review may be required from the Department and DWR prior to implementing certain actions related to habitat restoration required under the ITP. At the time of execution of the ITP, the specific proposals for such actions required by the ITP, while committing DWR to provide habitat, have not been well enough defined as to their location and specific land modification and restoration

¹ Baxter, R., M. Nobriga, S. Slater, B. Fujimura. February 2009. State Water Project Effects on Longfin Smelt. 87 pages.

requirements to provide meaningful information for environmental assessment. Therefore, at this time environmental analysis of such proposals would be premature but will be required, as necessary, in the future.